UNITED STATES DISTRICT JUDGE
DISTRICT OF MASSACHUSETTS

BARBARA CORDI-ALLEN, et al., Plaintiffs, v. JOSEPH CONLON, et al., Defendants.	CIVIL ACTION NO. 05-10370-PBS

MEMORANDUM AND ORDER

July 19, 2006

Saris, U.S.D.J.

INTRODUCTION

This case involves a heated zoning dispute in Truro, Massachusetts over waterfront property on Cape Cod. As a basis for federal question jurisdiction, plaintiffs Barbara Cordi-Allen and John Allen assert a claim pursuant to 42 U.S.C. § 1983 that the Town of Truro discriminated against them in violation of the Equal Protection Clause of the United States Constitution by requiring them to get a special permit to build a home when it treated a neighbor located nearby more favorably, and by arbitrarily treating them in other ways as well.[1] They allege

[1] Plaintiffs have made other federal claims of unlawful takings by eminent domain and substantive due process violations in passing, but they have not pressed those claims either in the briefing or at the hearing. I do not address them and consider them waived.

various state causes of action.[2] Most significantly, pursuant to Mass. Gen. Laws ch. 40A, § 17, they appeal a decision of the Town of Truro Zoning Board of Appeals denying Ms. Cordi-Allen's request for revocation of a building permit and enforcement of the Town of Truro's Zoning Bylaws against defendant Brooke Newman, the neighbor.

Defendants Town of Truro and the individual members of the Truro Zoning Board of Appeals have moved for summary judgment on all counts. The neighbor Brooke Newman has moved for summary judgment on Count 1, the only count in which she is a defendant. After hearing, the Court dismisses the federal cause of action and remands the state claims.

UNDISPUTED FACTS

The record, which involves multiple proceedings before the Town of Truro, the Truro Conservation Commission, the Department of Environmental Protection ("DEP"), and the state courts, is often quite difficult to follow. The following facts appear to be undisputed except where otherwise stated.

1. The Purchase of the Boathouse Cottage

In March 1996, the Allens purchased their waterfront property on 5 Yacht Club Road, Truro, Massachusetts, from

[2] The complaint asserts: an appeal of the Zoning Board of Appeals Decision, Mass. Gen. Laws ch. 40A, § 17 (count 1); a Federal Civil Rights claim under of 28 U.S.C. § 1983 (count 2); State Civil Rights claim under Mass. Gen. Laws ch. 12, §§ 11H and 111 (count 3); Reversal of Eminent Domain in violation of the state and federal Constitution (count 4); and request for declaratory judgment (count 5).

Financial Enterprises, Inc. ("FEC"). It is part of a three-lot subdivision within the Pamet River/Mill Creek embayment approved by the Truro Planning Board in 1972. The property abuts property owned by defendant Brooke Newman, Sara Landis, and The Pamet Harbor Yacht Club. The Allens' property currently contains a small 400 square foot cottage on approximately .561 acres (24,437 square feet) of land directly on Pamet Harbor.

The Allen property also has a fixed pier extending from the cottage, which was once a boathouse, approximately 122 feet from mean high water into the Pamet River. The property has an easement for the pier. Currently, the property owned by the Allens is not licensed for a float.

2. Problems on the Land

Development of the property ran into problems early on. In 1992, the prior owner had submitted a request for a variance under Title V to construct a non-nitrogen removing septic system for the property. The requested variance was approved by the Truro Board of Selectmen in a decision that stated, "Regardless of the capabilities of the Title V system, the dwelling will be restricted to a one (1) bedroom residence." However, in the next step, the request was denied on February 9, 1993 by the Truro Conservation Commission, stating: "The Commission finds the site of the proposed septic system to be in flood zone A4, and mainly in the 100 foot buffer zone of the shore of Pamet Harbor, a tidal salt water body. The site is an altered coastal dune." (Revere Aff., Ex. 3) (emphasis added). In May 1993, the Southeast

Regional Office of the DEP approved the site plan, stating its determination that the "resource area in which the site is located is Land Subject to Coastal Storm Flowage." No appeal was taken. Whether or not plaintiffs' property is on a "coastal dune" or a "coastal bank" continues to be a dispute significant to this litigation and parallel adjudicatory hearings in state court and before the DEP.

Initially unaware of the one-bedroom limitation in the 1992 decision by the Truro Board of Selectmen, the Allens had plans for a larger home. After purchasing the property in April 1997, the Allens requested certain variances from the Truro Board of Health (which had taken over the task of evaluating septic systems from the Board of Selectmen) for a new three-bedroom septic system. The Allens took the position that the septic plan was consistent with the wetland resource areas – in their view, a coastal bank and land subject to coastal storm flowage. The leaching field met Truro's requirement to maintain 100 feet of separation between the leaching field and the shores of Pamet Harbor. Truro denied the variances in 1997, but the Allens appealed to the Superior Court, which ordered the variances granted on April 15, 1999 because Truro had acted belatedly in ruling on the variances in violation of the statutory time period.

Then, in June 1999, plaintiffs applied to the DEP for a variance. At this point, the record is muddy because the Allens were floating different plans for expansion. Although initially

denying the request for a variance, the DEP approved the variance on January 18, 2000, and on June 8, 2000 the DEP issued a superseding order setting conditions for a relocated dwelling, pool, and detached garage under the Wetlands Protection Act, and approving the proposal for septic variances within certain criteria. Apparently the DEP was confused because the superseding order setting conditions and the variance referenced different plans, so the Allens requested that the DEP variance be modified to reflect the new plan. (It is not clear from the record what the "new plan" is.) The DEP approved the new plans on April 30, 200l and issued an amended DEP variance. In 2001, the Town of Truro and the abutting neighbor Brooke Newman requested an adjudicatory hearing before the DEP and filed actions in Superior Court challenging this amended DEP variance on the ground that DEP did not properly count the number of bedrooms. The Town contended there were at least five bedrooms due to the fact that the plans show a total of ten rooms, and also challenged the variance as not in the public interest. The Allens contend there are three bedrooms and that the Town was unfairly counting hall space. These actions are pending.

The current plans for development of the cottage are grandiose. The Allens propose to construct a new 1512 square foot single family dwelling with a new attached garage of 1750 square feet; to renovate the cottage/boathouse into a second dwelling which is 640 square feet in area; and to install an inground pool of 410 square feet in area with surrounding decks.

All construction is proposed on solid foundations. Construction will take place within 20 feet of the mean high water mark and within 3 feet of the top of the coastal bank/dune. The leaching component is proposed to be located about 115 feet from the high water mark. The flood elevation is 12 feet; the proposed construction is between eight and ten feet in elevation.

In April 2002, Town Counsel wrote to the Allens that they needed a variance from the zoning bylaw to expand their home, or at a minimum obtain a special permit. The Allens have never submitted a request for a special permit or variance, and dispute that they should be required to do so because of the timing of their subdivision plan in 1972 which they claim grandfathered their lot from the 33,750 square foot zoning requirements. See Bylaw Section 1X(A)(1) (stating that no building shall be constructed on a lot with an area less than 33,750 square feet). See Mass. Gen. Laws ch. 40A, § 96. The Town disagrees, contending that the subdivision plan went into effect after the zoning change. Regardless of the merits of this dispute, the Allens complained bitterly to Town officials that Ms. Newman was favored because she was only required to get a regular building permit to expand her home. The Truro Conservation Commission has never reviewed the Allens' plan for building expansion because it is presently pending review in an administrative proceeding before the DEP. The project construction has not yet begun.

3. Problems on the Water

On July 24, 1998, the Army Corps of Engineers informed the

Allens it was unlikely to allow the then pending application to extend the floats approximately 100 feet from the existing pier. Among other things, the Army Corps believed it would restrict navigation in the harbor at low tide. It expressed a willingness to issue a permit for a shorter pier and float consistent with the adjacent Yacht Club pier.

Prior to the Allens' purchase, the DEP had determined that the license pursuant to Mass. Gen. Laws Chapter 91 was valid for the fixed pier, but that any pile-held floats would require a DEP-issued Chapter 91 license. However, the DEP took the position that bottom-anchored floats could be installed pursuant to an annual Chapter 91, § 10A permit from the local Harbormaster. The Allens applied to the DEP for a Chapter 91 license to maintain and extend a pier and two floats. The Town administrator and Harbormaster sent letters opposing this request on June 19, 2000. In 2000, the DEP denied the Chapter 91 license, and that denial is now the subject of an adjudicatory hearing.

On February 15, 2002, the Town of Truro took the tidelands in front of the plaintiffs' property by eminent domain and offered the Allens $2,500 for the land, which was the lowest offer to any property owners and approximately ten percent of the amounts paid to their residential neighbors, including Ms. Newman. The Town explained as a reason for the low offer that the property had an easement for the pier, and therefore asserts there was no significant diminution in property value. An

eminent domain action is now pending in Superior Court.

In July 2004, the Allens again requested authority to install floats off of the "viewing platform" of the pier. Town Counsel refused the licenses as the Town owned the tidelands in which they would be located. However, the Town of Truro licensed for two years the pre-existing floats of the Pamet Harbor Yacht Club which, according to the Allens, extend beyond their easement.

4. The Newman Property

The Newman house is set somewhat back behind the Allens' home, but has access to the waterfront via a pathway. The property abuts the plaintiffs' property. The renovated two-bedroom dwelling (the Allens claim it is really a three-bedroom dwelling) is approximately 183 feet from the mean high water mark and 162 feet from the top of the coastal bank. The leaching component of the septic system is located over 225 feet from the mean high water mark. The flood zone for the property is at elevation 12 feet and the house is constructed between 10 and 12 feet. The structure, as it was proposed to the Commission, is on a crawl space foundation with break-away panels as required by the building code because the dwelling is in a flood zone.

On October 28, 1998, the Building Department of the Town of Truro issued a building permit for construction on the Newman property at 3 Yacht Club Road without requiring Ms. Newman to obtain a special permit or a variance. The Newman proposal involved the relocation of a pre-existing dwelling, the addition

of a second floor, a new foundation, a proposed 90 square foot addition, and an upgraded Title V septic system.

During May 1998 through February 1999, the Truro Conservation Commission issued an order of conditions and modifications allowing Ms. Newman to relocate and expand her home at 3 Yacht Club Road. The Allens' property is between the Newman property and Pamet Harbor. The Allens contend that the conditions placed on this property were different from the treatment they received when they filed their notice of intent with the Truro Conservation Commission in 1996 because the plans contained the same wetland resource areas (coastal bank and land subject to coastal storm flowage).

In May 2004, five years after the completion of the two-story renovated Newman dwelling, the Allens requested that the Truro Conservation Commission initiate enforcement against Newman for failure to comply with the terms of her order of conditions and with the "coastal dune" performance standards which the Commission and Ms. Newman had argued before the DEP should have applied to the Allen property. On November 4, 2004, the Commission voted to issue a certificate of compliance that the work performed by Ms. Newman was "in substantial compliance with her approved plans."

On July 26, 2004, Cordi-Allen requested that the Building Commissioner enforce the Truro zoning bylaw by revoking the building permit issued to Brooke Newman and requiring her to obtain a special permit or variance for her addition. Plaintiffs

took the position that a special permit or variance was required to move the Newman dwelling and construct the 90 square foot addition as the lot on which the property was located was less than 33,750 square feet.

In contrast, the Allens point out they were required to apply for a special permit because they had an undersized lot. On October 19, 2004, the Truro Building Commissioner tersely denied the Allens' request for action on the ground that it was authorized to do so by Bylaw Section VIII-B.2,[3] stating that the former commissioner had determined that Newman's proposal was not "substantially more detrimental to the neighborhood" and "will not increase the nature or extent of the nonconformity." On October 26, 2004, Cordi-Allen appealed to the Truro Board of Appeals and filed notice with the Barnstable Country Registry of Deeds on the following day. The Truro Zoning Board of Appeals held a public hearing in December 2004 and again on January 10, 2005. On January 19, 2005, the appeal was denied on the merits

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[3] Section VII.B.1 of the Truro Zoning Bylaw provides:

> Lawful preexisting, non-conforming structures and uses may, when a variance would otherwise be required, be altered, or extended with a special permit if the Board of Appeals finds that the alteration or extension will not be substantially more detrimental to the neighborhood than the existing nonconforming structure or use and the alteration or extension will exist in harmony with the general purpose and intent of the bylaw.

Section VII-B.2 allows the Building Commissioner to issue a simple building permit if Section VII.B.1 does not apply when the applicant proposes "repair, reconstruction, alteration, or structural changes."

and as time-barred. This action was filed on February 8, 2005 in the Superior Court and was timely removed here.

5. The Sara Landis Property

The Landis waterfront property abuts the Newman property. The Landis site plan, which was approved by the Truro Conservation Commission at its meeting on April 12, 2004, proposed an addition to an existing dwelling which was approximately 800 square feet in area located approximately 190 feet from mean high water mark. The foundation for the addition, which is now completed, was constructed on pilings, which the Conservation Commission claims is "in compliance with building code requirements for construction in a flood plain." The Commission did not take the position it was located on a sand dune. The flood zone elevation was at 12 feet, and the house was to be constructed at a ground elevation level of 12 feet. Landis requested the grant of a special permit for the addition and renovation of an existing dwelling on a pre-existing non-conforming lot. The Truro Board of Appeals granted the special permit on December 16, 2003 pursuant to Bylaw Section VII.B.1.

DISCUSSION

1. Summary Judgment Standard

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Barbour v.

Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995) (quoting Fed. R. Civ. P. 56(c)), cert. denied, 116 S. Ct. 914 (1996). "To succeed [in a motion for summary judgment], the moving party must show that there is an absence of evidence to support the nonmoving party's position." Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990); see also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

"Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.'" Barbour, 63 F.3d at 37 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). "There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" Rogers, 902 F.2d at 143 (quoting Anderson, 477 U.S. at 249-50) (citations and footnote in Anderson omitted). The Court must "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." Barbour, 63 F.3d at 36.

2. Statute of Limitations

Defendants contend that the § 1983 claim is barred by the three-year statute of limitations and is not supported by the record. The parties agree that the statute of limitations that applies to the civil rights claim under 42 U.S.C. § 1983 is three

years. See Street v. Vose, 936 F.2d 38, 39 (1st Cir. 1991). It accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. Id. at 40. This lawsuit was filed in February 2005.

Plaintiffs claim that the Town of Truro discriminated against them in three ways. First, they claim that Town Counsel told them on April 5, 2002 they were required to get a special permit or a variance for their new dwelling while Newman next door was not required to get a special permit in 1998. That claim is not time-barred.

Next, plaintiffs claim that the Truro Conservation Commission was making an argument that the Allens were proposing to build a new structure on a "coastal dune" which carries more stringent septic and WPA requirements, although it classified Newman's new dwelling as located on a "coastal bank." That claim is time-barred because the Town of Truro took that position in 2001 when it appealed the DEP determination to grant the septic variance, whereas in 1999 it took the position that the Newman property did not contain a coastal dune.

Finally, the Allens complain that the Town refused to license their request for a float on the tidal flats of Pamet River but allowed the nearby Yacht Club to have the floats. That claim is not time-barred because Town Counsel denied the permit in July 2004. Therefore, the claim must be addressed on the merits.

3. The Merits

Plaintiffs argue that the defendants' alleged different treatment with respect to their applications and requests, when compared with these other properties, had no "rational basis." See generally Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (per curiam). To prevail on a "class of one" allegation, plaintiffs must prove that the Town (1) intentionally treated them differently; (2) from others similarly situated; and (3) without a rational basis for the difference in treatment. See Pariseau v. City of Brockton, 135 F. Supp. 2d 257, 263 (D. Mass. 2001). The Supreme Court did not require a showing of subjective ill will or illegitimate animus. See Burns v. State Police Ass'n of Mass., 230 F.3d 8, 12 n.4 (1st Cir. 2000). In Tapalian v. Tusino, 377 F.3d 1, 6 (1st Cir. 2004), however, the First Circuit held that normally a plaintiff must establish "more than that the government official's actions were simply arbitrary or erroneous; instead, the plaintiff must establish that the defendant's actions constituted a 'gross abuse of power.'" The Seventh Circuit has similarly held that the "no rational basis" standard requires that the plaintiffs "present evidence that the defendant deliberately sought to deprive [them] of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000). This showing requires "more than just a perceived difference in treatment for which the

plaintiff has received an unsatisfactory explanation." Lakeside Builders, Inc. v. Planning Bd., 2002 U.S. Dist. LEXIS 4725, at *10 (D. Mass. March 21, 2002) (citing Hilton, 209 F.3d at 1008); See also Vill. of Willowbrook v. Olech, 528 U.S. at 565 (Breyer, J., concurring).

Here, the primary focus of plaintiffs' ire is their perception that they were treated differently from Ms. Newman. However, the undisputed facts demonstrate they were not similarly situated, as the picture of the two properties in the record amply illustrates. With respect to the Town's requirement that the Allens seek a special permit or variance, Newman sought to expand a pre-existing structure by 900 square feet; the Allens sought to build a brand new compound with two buildings, and a deck and pool complex of over 4,000 square feet. It was not irrational for Town Counsel to opine that under Truro Bylaw Section VII.B.1 the new home was a non-conforming structure that required at least a special permit. The proposed new Allen home did not simply involve "repair, construction, alteration or structural changes" which gave the Building Commission the discretion to act without a special permit. Significantly, the other next door neighbor, Sara Landis, was also required to seek a special permit. Thus, the Allens are not a class of one, but at least a class of two. It may well be that Newman should have been required to get a special permit for the relocation of her home and the addition. However, the controversy involves a good faith dispute over the application of the zoning bylaw (about

which I do not rule), not irrational or malicious disparate treatment.

The next issue[4] is whether the Truro Conservation Commission unfairly sought to characterize the location of the Allens' new proposed dwelling as a "sand dune" or a "coastal bank." Here, while the record is not clear on this point, the Town allegedly took an inconsistent position with respect to Newman's property (located 183 feet from the mean high water mark and 162 feet from the coastal bank) by permitting her to build a foundation consistent with a flood zone (i.e. a foundation that could drain by having a crawl space). By seeking to designate the Allens' house as located on a dune, the Town Conservation Commission apparently seeks to require the new home (about 20 feet from the high water mark) to be placed on pillars. There is a disputed fact issue as to whether the area is an altered coastal dune or a coastal bank. However, the dispute is not material because another similarly situated home is the Landis home, 190 feet from the mean high water mark, not the Newman home; the Landis addition was placed on pillars. Moreover, the Allens want to build on a solid foundation without even the crawl space that Newman has for drainage. Other nearby waterfront properties owned by the Perrys and the Sextons also have pilings. Thus, regardless of the dune/coastal bank dispute, there is no evidence

[4] This claim is time-barred but plaintiffs use evidence of the disparate impact to moor their claim that the Town is discriminating against them.

that the Allens' property was treated differently from Landis's property or other waterfront properties farther from the high water mark. The difference between the locations of the Newman and Allen properties demonstrates a lack of similarity. Certainly there is no evidence of such an arbitrariness or gross abuse of power to trigger concerns of a constitutional magnitude.

Finally, the record is antiseptic on the Town's recent 2004 decision to deny a license for the float on the tidal flat which plaintiffs allege goes no further into the Pamet River than the Yacht Club. On the float issue, plaintiffs have not adequately explained the basis for the disparate impact claim and the record is extremely confusing as to the sequence of events and the regulatory scheme for the various requirements for piers and floats. For example, it is not clear whether the Yacht Club has anchored floats or floats on piles or what kind of float plaintiffs were seeking. In any event, the Yacht Club pier and float are not similarly situated to the Allens' pier and float because the floats for the Yacht Club were apparently licensed before the eminent domain taking whereas the DEP and the Army Corps of Engineers had denied the Allens' request for a license and permit for the floats. This claim does not have support in the record to demonstrate either that the floats were similarly situated or that the Town was acting irrationally in light of previous decisions by the DEP and Army Corps of Engineers.

ORDER

The motion to dismiss the federal claims is **ALLOWED**. The

State claims are **REMANDED** to state court.

S/PATTI B. SARIS
UNITED STATES DISTRICT JUDGE